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No. 47

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 24(5)

PAUL A. PORTER
ABE KRASH
DANIEL A. REZNECK
JEROME I. CHAPMAN
Arnold & Porter
1229 19th Street, N. W.
Washington, D. C. 20036
Attorneys for The Tobacco Institute, Inc., and Philip Morris Inc.

ADDISON YEAMAN
JAMES N. RAVLIN
Brown & Williamson Tobacco Corp.
1600 West Hill Street
Louisville, Kentucky 40201
Attorneys for Brown & Williamson Tobacco Corp.

DONALD J. COHN
Webster, Sheffield, Fleischmann, Hitchcock & Brookfield
One Rockefeller Plaza
New York, New York 10020
Attorney for Liggett & Myers Inc.

PORTER R. CHANDLER
Davis Polk & Wardwell
One Chase Manhattan Plaza
New York, New York 10005
Attorney for R. J. Reynolds Tobacco Co.

EUGENE R. ANDERSON
JANET C. BROWN
Chadbourne, Parke, Whiteside & Wolff
25 Broadway
New York, New York 10004
Attorneys for The American Tobacco Co.

FIELDING L. WILLIAMS
Williams, Mullen & Christian
510 United Virginia Bank Bldg.
Richmond, Virginia 23219
Attorney for Larus & Brother Co., Inc.

CARLETON A. HARKRADER
Wald, Harkrader & Rockefeller
1225 19th Street, N. W.
Washington, D. C. 20036
Attorney for Lorillard Co.

ALFRED S. FORSYTH
Forsyth, Decker & Murray
51 West 51st Street
New York, New York 10019
Attorney for United States Tobacco Co.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1036

THE TOBACCO INSTITUTE, INC., THE AMERICAN TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., LARUS & BROTHER CO., INC., LIGGETT & MYERS INC., LORILLARD CO., PHILIP MORRIS INC., R. J. REYNOLDS TOBACCO CO., and UNITED STATES TOBACCO CO., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 24(5)

In our Reply Brief in this case, we agreed with the Solicitor General's suggestion that this Court defer ruling on our Petition for Certiorari until the decision in *Red Lion Broadcasting Co.* v. *FCC* and *United States* v. *Radio Television News Directors Association,*

Nos. 2 and 717, O.T. 1968. Those cases have now been decided by this Court in an opinion rendered June 9, 1969. This Supplemental Brief is submitted pursuant to Rule 24(5) of this Court to discuss the applicability of those cases to and of *NLRB* v. *Wyman-Gordon Co.*, 89 Sup. Ct. 1426 (April 23, 1969) to the present case.

The decision in *Red Lion* and *RTNDA* was this Court's first confrontation with the so-called "Fairness Doctrine" as created and applied by the FCC. This Court plainly envisaged that it would not be the last, and that clarification of the scope and reach of the doctrine can come about only through case-by-case adjudication. As the Court stated:

> "We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable [citation omitted], but will deal with those problems if and when they arise." Slip Opinion, p. 27.

This Court's decision in *Red Lion* and *RTNDA* was thus carefully limited to the specific situations before it. *Red Lion* involved "the application of the fairness doctrine to a particular broadcast" (Slip Opinion, p. 2)—a personal attack on an individual who wished to reply but was refused free reply time by the licensee. In effect, the licensee was acting as censor over access to the airwaves, and this Court held that "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." Slip Opinion, p. 24. *RTNDA* merely upheld *on their face* the regulations promulgated by the FCC during the *Red Lion* litigation to make more precise the personal attack aspect of the "Fairness Doctrine."

RTNDA settled no question of application even of the personal attack regulations, much less any other question arising under the "Fairness Doctrine."

Thus neither *Red Lion* nor *RTNDA* comes close to resolving the difficult questions presented by this case, about which the court below stated:

> "It is clear to us that, even if incorporated into the fairness doctrine, the ruling before us is to all intents a novel application. . . . [A]s an extension of the fairness doctrine, it is an unusual limitation of the licensee's discretion. And as an independent public interest ruling it requires independent support. We cannot uphold it merely on the ground that it may reasonably be thought to serve the public interest." (Appendix to Petitions for Certiorari, pp. 15a, 24a-25a.)

We submit that this case is an appropriate vehicle to resolve some of the issues expressly left for future decision by this Court in *Red Lion* and *RTNDA*. For example, this Court stated in those cases:

> "We need not and do not now ratify every past and future decision by the FCC with regard to programming. *There is no question here . . . of the official government view dominating public broadcasting.*" Slip Opinion, p. 27. (Emphasis supplied.)

The question of the "official government view dominating public broadcasting" is presented by the FCC's cigarette ruling. The FCC has singled out a product—cigarettes—for unique application of the "Fairness Doctrine" to commercial advertising because some governmental agencies, including the FCC, have reached the conclusion that cigarette smoking is inju-

rious to health. In upholding the cigarette ruling, the court below stated:

> "[the FCC] took the word of the Surgeon General's Advisory Committee, whose findings had already been adopted in substance by the Department of Health, Education, and Welfare, the Federal Trade Commission, and the Senate Commerce Committee, and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act." (Appendix, *supra,* pp. 28a-29a.)

The cigarette ruling is thus a clear example—the first and hopefully the last—of the FCC's acting to propagate an official governmental point of view over the airwaves on a controversial issue of public importance. The FCC's determination to propagandize the public is not episodic or sporadic—in requiring licensees to provide substantial amounts of prime time each week to broadcast the anti-smoking position favored by the FCC, the Commission envisages an anti-smoking campaign of large dimensions. Nothing in *Red Lion* or *RTNDA,* however, purports to validate the FCC's power to saturate the airwaves with an official governmental view on cigarettes or any other subject. It would indeed be regrettable if the FCC regarded the decision in *Red Lion* and *RTNDA* as a charter for it to prescribe the content of programming in accordance with governmental policy.

Moreover, this Court clearly indicated in *Red Lion* and *RTNDA* that the FCC has no mandate for arbitrariness or application of the "Fairness Doctrine" by fiat. The FCC's distinctions in applying the "Fairness Doctrine" must be substantial and rational. As this Court stated:

> "we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic con-

ception of the public interest . . . ." Slip Opinion, p. 27.

We submit that the FCC's singling out of cigarette advertising for application of the "Fairness Doctrine" cannot be squared with its obligation to reach principled decisions. This Court in *Red Lion* and *RTNDA* found that the "Fairness Doctrine" itself was supported by "[t]hirty years of consistent administrative construction" and express acceptance of that construction by Congress. Slip Opinion, p. 13. No history of administrative construction and congressional acceptance supports the application of the "Fairness Doctrine" to commercial advertising, much less its application to a single product. The court below conceded the novelty and uniqueness of the cigarette ruling.

Applying the "Fairness Doctrine" to cigarette advertising and not to advertising for other products about which there is also public controversy is indeed "idiosyncratic." No rational justification for this distinction has yet been offered by proponents of the ruling—except perhaps the impermissible contention that cigarettes should be treated differently on the erroneous assumption that they have been singled out by various governmental agencies and there is a need to "educate" the public as to the views of these governmental agencies.[1]

In its opinion in *Red Lion* and *RTNDA*, this Court indicated that a "discriminatory refusal" by the FCC

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[1] As we pointed out in our Petition for Certiorari, pp. 21-22, it is not even true that cigarettes have been singled out by other governmental agencies for special treatment. Many other products have become the subject of public controversy and governmental reports and regulation.

to apply the "Fairness Doctrine" would raise a serious First Amendment issue. Slip Opinion, p. 27. Discriminatory application of the doctrine by the FCC is equally subject to challenge on grounds of unconstitutionality and lack of statutory authority. The cigarette ruling embodies a discriminatory application of the "Fairness Doctrine" by the FCC.

In consideration of the arbitrariness of the cigarette ruling, it is also relevant to note the important procedural differences between the FCC's actions in *Red Lion* and *RTNDA* on the one hand and in the present case on the other. In *Red Lion,* although a formal adjudicative proceeding was not held, the licensee was given notice and opportunity to be heard before decision by the FCC. In *RTNDA,* the FCC commenced a formal rule-making proceeding, elicited the comments of all interested parties, and then reached its decision.

By contrast, in the present case the FCC handed down its initial decision without even giving the licensee complained against notice of the complaint and opportunity to reply. Although the decision affects all licensees in the country, no other persons were given an opportunity to be heard. It was only *after* the FCC had decided to apply the "Fairness Doctrine" to cigarette advertising that it accepted submissions from interested parties, mainly in the form of petitions for reconsideration, but even then it refused to hold a formal rule-making proceeding, accorded no oral hearing to any one, and came to its decision without making a factual record.

By this extraordinary procedure—violating the norms for adjudicatory as well as for rule-making

proceedings—the Commission adopted a formal rule. The Commission expressly made its rule applicable to all licensees and gave it prospective effect only. This action cannot be squared with this Court's decision, handed down on April 23, 1969, in *NLRB* v. *Wyman-Gordon Co.*, 89 Sup. Ct. 1426. As the Court held in that case, "There is no warrant in law for the [Commission] to replace the statutory scheme [of the Administrative Procedure Act] with a rule-making procedure of its own invention." *Id.* at 1429. Surely *Red Lion* and *RTNDA* were not intended to validate applications of the "Fairness Doctrine" reached without regard for basic procedural fairness or elementary principles of administrative decision-making.

Finally, we emphasize that the question of the conflict between the cigarette ruling and the preemption provisions of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331-39, remains as live and substantial as ever. *Red Lion* and *RTNDA* were solely concerned with the Communications Act of 1934, not with the interplay of that Act with any other federal statute.

The preemption problem shows no signs of evaporating. On May 28, 1969, the House Committee on Interstate and Foreign Commerce reported a new bill, H.R. 6543, which would extend the preemption provisions of the present law until July 1, 1975. See H.R. Rep. No. 289, 91st Cong., 1st Sess. As we pointed out in our Petition for Certiorari, p. 26 n. 19, wholly apart from whether the preemption provisions are extended, the cigarette ruling has had immediate and potentially serious consequences for licensees since its promulgation in September 1967. If the cigarette ruling is unlawful for any reason, including conflict

with the Federal Cigarette Labeling and Advertising Act, it should not be left to dangle over licensees.

CONCLUSION

For these reasons, and those already presented in our Petition for Certiorari and our Reply Brief, we respectfully submit that this Court should grant certiorari in this case.

Respectfully submitted,

PAUL A. PORTER
ABE KRASH
DANIEL A. REZNECK
JEROME I. CHAPMAN
Arnold & Porter
1229 19th Street, N.W.
Washington, D.C. 20036
Attorneys for the Tobacco Institute, Inc., and Philip Morris Inc.

ADDISON YEAMAN
JAMES N. RAVLIN
Brown & Williamson Tobacco Corp.
1600 West Hill Street
Louisville, Kentucky 40201
Attorneys for Brown & Williamson Tobacco Corp.

DONALD J. COHN
Webster, Sheffield, Fleischmann, Hitchcock & Brookfield
One Rockefeller Plaza
New York, New York 10020
Attorney for Liggett & Myers Inc.

PORTER R. CHANDLER
Davis Polk & Wardwell
One Chase Manhattan Plaza
New York, New York 10005
Attorney for R. J. Reynolds Tobacco Co.

EUGENE R. ANDERSON
JANET C. BROWN
Chadbourne, Parke, Whiteside & Wolff
25 Broadway
New York, New York 10004
Attorneys for The American Tobacco Co.

FIELDING L. WILLIAMS
Williams, Mullen & Christian
510 United Virginia Bank Bldg.
Richmond, Virginia 23219
Attorney for Larus & Brother Co., Inc.

CARLETON A. HARKRADER
Wald, Harkrader & Rockefeller
1225 19th Street, N.W.
Washington, D.C. 20036
Attorney for Lorillard Co.

ALFRED S. FORSYTH
Forsyth, Decker & Murray
51 West 51st Street
New York, New York 10019
Attorney for United States Tobacco Co.

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